courts note that not only is a body of local law as to such issues readily available, but also these issues often have substantial contacts with the states and therefore apply such law as they determine state courts would have done had they been compelled to decide these cases. Respondent also urges that because this rule is long established it already supplies a type of uniformity in these cases and, perhaps, as much uniformity as can be expected in light of the fact that state courts now have concurrent jurisdiction over Section 301 actions with the federal courts under decisions of this Court in *Smith* v. *Evening News Association,* 371 U. S. 195. Ultimately, it is Respondent's position that a form of national uniformity already exists in this area under the rule stated in this section of its Brief and, thus, there is no need for a national formulation in this case and particularly so where Petitioner has advanced no really substantial policy reasons for such formulation.

3. Point III of Respondent's Brief deals with an assumption not accepted by it but taken for the purposes of argument only. This assumption is to the effect that: Given the fact of a need for a national formulation as to the period of limitations applicable to Section 301 actions, this formulation must be made with reference to prior decisions in this area, legislative history and practical or day-to-day facts of industrial life. Thus the few courts dealing with what period in theory would be applicable to these actions have expressed the view that the six-month period of limitations placed on the filing of unfair labor practice charges with the National Labor Relations Board should apply as provided in Section 10(b) of the Labor Management Relations Act. This is true because failure to use this period could well frustrate the policy of Congress in placing this limitation period on unfair labor practice charges given the fact that actions under 301 could well encompass such violations of Section 8(a) and 8(b) of the

Labor Management Relations Act. *International Union of Op. Eng.* v. *Fischbach and Moore, Inc.*, 350 U. S. F. 2d 936 (CCA-9, 1965); *Tully* v. *Fred Olson Motor Serv. Co.*, 134 N. W. 2d 393 ..... Wisc. ..... (1965). This position has additional support in the decisions of this Court relating to the self-evident policies of speed and stability built into the structure of national labor relations law *Local 1424, International Assoc. of Mach.* v. *N. L. R. B.*, 362 U. S. 411, as well as the legislative history of the Act itself wherein those in Congress most responsible for this legislation viewed its entire structure as but part of a whole. When these factors, therefore, are placed in proper prospective by adding the fact that the National Labor Relations Board as required by Section 9 of the Act must process representation petitions subjecting the collective bargaining relationship to statutorily sanctioned change, it becomes apparent that the period of limitations applicable to these actions must, of necessity, be brief. This is particularly so where collective bargaining contracts are usually of relatively short duration and any period of limitations of long duration would result in the use of suits under Section 301 either as a bargaining leverage or as a means of disrupting existing collective bargaining relationships.

4. Respondent, under Part IV of this Brief, deals with an analysis of the facts in the record in light of the rule as to the tolling of limitations applicable to actions under the Federal Employer's Liability Act formulated by this Court in *Burnett* v. *New York Central R. R. Co.*, 380 U. S. 424. This section of the Brief is concerned with two propositions. It is Respondent's position that the issue as to the tolling of any applicable period of limitations in this case is not properly before this Court because in the proceedings below the Petitioner neither introduced facts in the record to support any assertion of the issue, but in addition it never raised any issue concerning tolling under

state or federal law even though this theory was readily available to it at any stage in these proceedings. Therefore, to allow Petitioner this double privilege would not only substantially prejudice the rights of Respondent, but would in addition make concealment a rule of practice in the federal courts. *Virginia Ry. Co.* v. *Mullens,* 271 U. S. 220; *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.,* 360 U. S. 334. In any event any period of tolling must have, as it did in *Burnett* v. *New York Central R. R. Co.,* a reasonable basis as well as support in the record upon which it was formulated. It would seem under this view that Petitioner is hoist upon its own petard. If it admits that the state court action was brought under a different theory of recovery sounding in local law by different parties, it is clear that no legally acceptable tolling rule will save its action. This is especially so where the original action was actually discontinued voluntarily by the original plaintiffs, certain former employees of the Respondent, by their refusal to bring the action properly even though they were given every opportunity to do so and even though they were advised by the trial judge as to how the action should be brought. In addition, if Petitioner argues that the state action was identical in all respects that action would be *res judicata* as to this action. Finally, it is Respondent's position as to the necessity for a formulation as to tolling under Section 301 that Petitioner has once again failed to establish any policy considerations meriting formulation in this case, which should be compared on this issue with *Burnett* v. *New York Central R. R. Co.* or, in general, to any claim arising under statutes designed to shift the burden of loss for personal injuries to employers for humanitarian and economic reasons.

5. The final section of Respondent's Brief, Point V, is devoted to discussion of the proposition in Petitioner's Brief to the effect that all actions under Section 301 are

based exclusively on collective bargaining agreements. This is a faulty inference derived from this court decision in *Smith* v. *Evening News Association,* 371 U. S. 195. In the first instance the conclusion is that because of this Petitioner's action is governed by an Indiana period of limitations of twenty years applicable to actions brought on written contract. As a matter of policy and national uniformity following from policy, it would seem that at this point Petitioner's argument in one portion of its Brief runs against its twenty year position, since given a need for uniformity and in light of a congressional intent of speed and stability, it would seem somewhat unusual that Petitioner according to its own Appendix B attached to its Petition for a Writ of Certiorari should choose as the applicable period the longest state period of limitations extant for actions on contract in writing and not under seal. In addition, assuming part of Petitioner's argument as to the theory of its action, it is extremely difficult to accept its conclusion that its action is "exclusively" on a written collective bargaining agreement. A mere perusal of its complaint makes that document unintelligible without reference to both Indiana wage claims statutes including the provisions therein for statutory penalties and attorney's fees and, finally, the existence of an employment relationship resting on oral contract between Respondent and its employees. It must also be observed, that if Indiana law is assumed to be applicable to Petitioner's action it must under an abundance of authority be controlled by the Indiana period of limitations of six years applicable to contracts not in writing since under local law actions partly on written contract and partly sounding in parol are governed by this statute. Ultimately, it must be observed that the Labor Management Relations Act itself not only in Section 9 relating to representation matter and Section 2 relating to definitions, but also in Section 7 recognizes

that the employment relationship has a legally recognized existence independent of the collective bargaining agreement and that loss of the collective bargaining contract by termination of the relationship has no necessary legal or practical effect on the employment relationship. 29 U.S.C. §§ 152, 157, 159; *J. I. Case Co.* v. *NLRB*, 321 U. S. 332.

ARGUMENT.

I.

THE COURT BELOW DID NOT HAVE JURISDICTION.

Petitioner's complaint filed in the District Court (R. 3) alleges that its action is brought under "Section 301 of the Labor Management Relations Act, 1947, as amended, Title 29 U.S.C., Section 185 *et seq.* Jurisdiction of this cause is vested in this Court by virtue of said Act of Congress." After making allegations as to the collective bargaining agreement between Respondent and Petitioner as well as Respondent's refusal to pay vacation pay purportedly due, paragraph 10 of the complaint and the prayer for relief reads as follows:

> "10. That pursuant to the Acts of the General Assembly for the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof and in accordance with the Acts of the General Assembly for the year 1933, Chapter 47, Section 2, there is due to the employees represented by the plaintiff an amount equal to double unpaid wages which amount is in excess of Eighty Thousand Dollars ($80,000.00).
>
> "Wherefore, the plaintiff asks judgment against the defendant corporation in the amount of Forty Thousand Dollars ($40,000.00) together with liquidated damages in the amount of Eighty Thousand Dollars ($80,000.00) together with a reasonable fee for plaintiff's attorney together with its costs and prays that the plaintiff may have such further relief as to the Court seems just." (R. 5).

The similarity between the allegations in the action filed by the Union and in the prior action filed on behalf of the individual employees is readily apparent. Although the

state court action set out in the Appendix to Petitioner's Brief is not in the record in this case, and as will be shown should not be considered by the Court in the determination of this case, the state court action was clearly one in which the individual employees, sought to bring a class action to recover their individual wage claims for vacation pay, statutory penalties and attorneys' fees. No relief whatever was sought on behalf of the Union or for anyone other than the individual employees. In the instant case the same thing is true. The Union is seeking to recover solely on behalf of the individual employees shown on Exhibit A of the complaint for vacation pay wages, and statutory penalties and attorney fees allowed solely under Indiana law. As a matter of fact, it has been held in Indiana that a cause of action based on the Indiana statutes pleaded in the complaint herein are personal to the individual employees and non-assignable. *McKenna* v. *Standard Oil Company,* 236 Ind. 370, 140 N. E. 2d 512 (1957). Under these circumstances it seems clear that the court below correctly on the basis of the allegations contained in Petitioner's complaint found "that the present suit frankly characterizes the choses in action involved as existing by virtue of the statutory law of Indiana." (R. 26).

As discussed at length in the dissent in and recognized by the Court in the majority opinion in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, the major constitutional question concerning the validity of Section 301 was the possibility that were it nothing more than a naked grant of jurisdiction to federal courts it could be violative of Article III of the Constitution because cases brought under its provisions would in actuality involve matter only within the judicial cognizance of state courts. This is, of course, what Petitioner has attempted to do in this case in that it has alleged jurisdiction under Section 301, but bottomed its action on substantive rights created by state

law. Although the Petitioner in its Brief urges that its action is based upon federal substantive law because the action is brought under Section 301, it is clear from the complaint that the Petitioner is claiming that the individual employees are entitled to vacation pay, which it characterizes as a claim on behalf of the individual employees for wages so as to bring the employees within the purview of the Indiana wage claim statutes and enable them, if successful, to recover penalties and attorney fees. In other words, Petitioner is trying to negate the thrust of clearly indicated constitutional difficulties concerning actions brought under Section 301 by characterizing its action as one under national law even in the light of the fact that its own pleadings indicate this is not the case. It seems clear that the observation by the Court in *Smith* v. *Evening News Association,* 371 U.S. 195, to the effect that jurisdiction under Section 301 in the federal courts is not unlimited has cogent application to Petitioner.

Prior to the Court's decision in *Smith* v. *Evening News Association,* 371 U.S. 195, and under authority of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, this action could not be brought because a labor union could not bring an action on behalf of individual employees for personal rights, such as a wage claim. In *Smith* it was held that the authority of the National Labor Relations Board to deal with an unfair labor practice, which also violates a collective bargaining agreement, is not displaced by Section 301 nor is it exclusive and, therefore, a suit could be maintained in either a state or federal court for violation of this statutory provision. *Smith* was a state court action. The Court did go on to say, however, that an individual employee could bring a Section 301 action either in a state or federal court to enforce a wage claim. On the other hand, there is no dicta in the case as to whether or not the union itself could

bring an action here for purely personal rights of an employee. The wage claims are solely those of the individual employees based on an oral contract of employment as supplemented by a collective bargaining agreement. This issue was not presented in the *Smith* case, yet the record in *Smith* does show an assignment of the claims to the plaintiff. Here there is no showing of an assignment, nor is there anything in the record indicating any legal claim or real interest on the part of the Petitioner. Respondent urges here, as it did in the District Court and the Court below, that Section 301 did not give jurisdiction of this action under the peculiar facts here involved.

Another jurisdictional question is raised in this case. At page 11 of Petitioner's Petition for a Writ and in its Brief herein at page 14, it uses as authority a most recent case decided by this Court, *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650. *Maddox* is but another expression of the express reasoning behind this Court's decisions in *Textile Workers Union* v. *Lincoln Mills of Ala.,* 353 U. S. 448, and *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574, to the effect that private settlement between the parties in accordance with grievance and arbitration procedures is in a preferred position.

In *Maddox* this Court reversed an Alabama state court's holding that the plaintiff (Maddox) was entitled to recover for breach of contract on the sole ground that plaintiff had failed to follow the grievance procedure as set forth in the contract between his employer and a labor union, and this even though the employer had gone out of business. The record in this case is more favorable to Respondent than it was to Republic Steel in the *Maddox* case, since, as shown by Exhibit A attached to Petitioner's complaint filed in the District Court, the contract between Petitioner and Respondent provided that "In order to become a matter for adjustment under the grievance procedure, the grievance

must be presented within five (5) working days after the employee or group of employees *or the union* has acquired knowledge of the act which is the basis of the grievance." (Emphasis supplied.) There is no reference in the record that Petitioner in this case filed a grievance, which would be necessary in order to give the court below jurisdiction to hear this case.

II.

IN THIS CASE THE LOWER COURTS CORRECTLY FOLLOWED THE STATE STATUTE OF LIMITATIONS SINCE NO FEDERAL LIMITATION WAS PROVIDED BY CONGRESS.

The issue concerning the applicable period of limitations, of course, springs from the fact that Congress not only has never enacted a general federal statute of limitations but that Congress failed to provide a period of limitations applicable to Section 301 actions. Is is the general rule that because the Rules of Decision Act, 28 U. S. C. Sec. 1652, provides that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil cases in the courts of the United States in cases where they apply," federal courts uniformly apply the state period of limitations and its interpretation by state courts[1] to actions under federal statutory schemes wherein Congress has failed to provide a period.[2] The exception to this general rule, as contained in the Rules of Decision Act, is illustrated by cases such as *Hanna* v. *Plumer,* 380 U. S. 460, wherein an explicit federal law or congressionally authorized rule conflicted with and therefore prevailed over state laws.

1. *Moore* v. *Illinois Central Railroad Co.,* 312 U. S. 630.

2. For general discussion of time limitations and federal causes of action see Blume & George, "Limitations and the Federal Courts," 49 Mich. L. Rev. 937 (1951); Note, "Federal Statutes Without Limitations Provisions," 53 Colum. L. Rev. 68 (1953).

As early as 1830 this Court held that federal courts were required to apply state statutes of limitations to federal cases unless Congress has expressly provided otherwise, *MiCluny* v. *Silliman*, 3 Pet. 270, 28 U. S. 415. Numerous cases decided under federal statutes since that time have followed a similar course, *Cope* v. *Anderson*, 331 U. S. 461 (National Bank Act); *McClaine* v. *Rankin*, 197 U. S. 154 (National Bank Act); *Campbell* v. *Haverhill*, 155 U. S. 610 (Patent Act); *Swick* v. *Glenn L. Martin Co.*, 68 F. Supp. 863 (D. C. Md. 1946), *affirmed* 160 F. 2d 483 (CCA-4, 1947), *cert. den.* 232 U. S. 772 (Fair Labor Standards Act); *O'Sullivan* v. *Felix*, 233 U. S. 318 (Civil Rights Act); *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (CCA-8 1945), *aff'd per curiam* 327 U. S. 757 (Anti-Trust Statutes). As has been pointed out by one observer, "the adoption of the state statutes seems so well established that the failure to designate a limitation period has been said to indicate a Congressional intention that state law be applied." Note, 76 Harv. L. Rev. 1306, 1307 (1963).[3]

These and other authorities are, of course, the *stare decises* relied upon in the few decisions dealing with the fact that this title of the *Labor Management Relations Act* contains no statute of limitations. In actions brought under Section 303 in *United Mine Workers* v. *Meadowcreek Coal Corp.*, 263 F. 2d 53 (CCA-6 1958), *cert. den.* 359 U. S. 1013, and *International U. of Op. Eng.* v. *Fischbach and Moore, Inc.*, 350 F. 2d 936 (CCA-9 1965), the courts were in agreement as to the application of the state period of limitations. Similarly in two cases decided under Section 301 the courts applied the local period of limitations. *Reliford* v. *Eastern Coal Corp.*, 260 F. 2d 447, 455 (CCA-6 1958), *cert. den.* 359 U. S. 958; *Tully* v. *Fred Olson Motor Serv. Co.*, 134 N. W. 2d 393, ... Wis. ..... (1965).

3. Also see Note, 60 Mich. L. Rev. 1164 (1962); Note, 110 U. Pa. L. Rev. 1165 (1962); Note, 64 W. Va. L. Rev. 442 (1962).

Petitioner argues that this Court should bar application of differing state standards and, instead, prescribe a uniform federal limitations for Section 301 actions (Pet. Br. pages 12 and 13).

Petitioner has shown no compelling reason in its brief supporting any departure from this general rule as it has been applied to a wide range of litigation under numerous federal statutes. It would seem that there is enough parity of public interest in civil rights, bank regulation, anti-trust problems and patents on the one hand and the Labor Management Relations Act on the other to indicate continuance of this rule of general application. This is particularly so where this rule supplies a type of uniformity due to its wide application and, in addition, as much uniformity as is possible given the fact of concurrent jurisdiction established in *Smith* v. *Evening News Association*, 371 U. S. 195.[4]

The danger of so-called forum shopping condemned by the Petitioner is just as prevalent in actions brought in the various states under these federal statutes as it would be in cases under Section 301, which risk is inherent in the federal system, particularly in view of the fact that concurrent jurisdiction has been established in *Smith* v. *Evening News*, 371 U. S. 195. Further, Petitioner has shown the wide divergence of periods of limitations in the various states throughout the country involving contract actions. This same wide divergence of state statutory periods of limitations in which a federal civil rights, federal antitrust actions, or other actions under federal statutes may be maintained exists, yet federal courts have no difficulty following the state statutory periods even though no federal limitation periods are contained in the federal statutes.

Certainly Congress is cognizant of the lack of uniformity with respect to the applicable statute of limitations under

4. See comments in Wellington, "Labor and the Federal System," 26 U. Chi. L. Rev. 542, 551 (1959).

the above acts as well as under Section 301 of the Labor Management Relations Act. However, it is apparently satisfied with the uniformity which exists in the well established rule that in such cases the state statute of limitations should apply and has not deemed it necessary or that the matter is of sufficient import to insert in any of said acts a federal period of limitations.

It is obvious that Petitioner's insistence upon a uniform federal statute of limitations in this case is a result of Petitioner's desire to escape the application of the Indiana statute of limitations. The Petitioner's action is clearly barred if these statutes apply. Petitioner argues that it should not be penalized in this action by the application of "local law philosophy of labor relations" (Pet. Br. p. 16), yet Petitioner has no difficulty in basing its claim on this philosophy or for that matter asking for the penalties and attorney fees provided by the Indiana wage claims statute.[5] We have already pointed out on page 11 of this brief that paragraph 10 of Petitioner's complaint and its prayer for relief is based squarely upon the Indiana wage claims statute. Under *Burns' Indiana Statutes Annotated, Section 2-602 (1),* a two year statute of limitations is applicable to actions brought for a forfeiture or penalty given by statute. As has been shown above, under Indiana law the wage claim statute creates a cause of action that is

5. Petitioner seeks to extricate itself from this predicament in a footnote at pages 9 and 10 of its brief by stating that the complaint alleges the action is brought under the provisions of Section 301 of the Labor Management Relations Act and that the recitation in the complaint of the Indiana statutes providing for double unpaid wages merely safeguards the benefit of any additional state remedy, but in any event the Section 301 suit could not become a state cause of action by virtue of the Petitioner's erroneous belief in that regard. The District Court and the Circuit Court below and the Respondent in this case must take Petitioner's complaint as it was presented, which is to recover wage claims for individual employees and specifically statutory penalties and attorney fees recoverable only by the individual employees and recoverable only under the Indiana statute.

personal and non-assignable and, therefore, personal to the individual employee asserting its violation. *McKenna* v. *Standard Oil Company,* 236 Ind. 370, 140 N. E. 2d 512 (1957).

Thus the Petitioner relies upon the Indiana statute as a basis of its recovery in this action yet would have this Court reject the application of the Indiana statutes of limitation. Petitioner, however, has no difficulty arguing finally in its brief at page 23 that if the Court rejects its plea to disregard the Indiana statute and its plea for a national uniformity, that the Indiana twenty year statute applicable to suits on contracts in writing should apply rather than the six year statute on contracts not in writing as found by the court below.

Finally, the Respondent suggests that if it is desirable that a uniform statute of limitations apply to Section 301 actions this condition should be corrected by Congress and not by a national formulation by this Court. It has been recognized by lower courts and writers on the subject, that where Congress has failed to establish a specific statute of limitations the void must be corrected by Congress itself, as it has done with respect to certain other federal statutes which originally were enacted without a statute of limitations, but which have since been amended to provide for federal limitations, *i.e.,* 35 U. S. C. 286 (Patent Act); 15 U. S. C. 15 (b) (Anti-trust Act).

III.

IF A NATIONAL FORMULATION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IS NECESSARY, THE SIX MONTHS PERIOD PROVIDED IN SECTION 10(b) OF SAID ACT SHOULD BE APPLIED.

The major portion of the Petitioner's Brief is devoted to a plea for national uniformity under Section 301 actions. It suggests that this end can be brought about by judicial creation of a period of limitations applicable to these cases. If a federally fashioned rule is to be applied, there is every reason to follow the rule embodied in the closely related Labor-Management Relations Act which in Section 10(b) provides that:

> ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." 29 U. S. C. § 160(b).

This six-month limitation clearly reflects Congress' desire, where unfair labor practices are involved, to expedite the resolution of labor disputes by requiring that both the complaining party and the Labor Board act promptly. The Section 10(b) limitation recognizes that labor disputes, unlike many other types of legal disputes, occur in the context of continuing relationships and that those relationships can be disrupted and wholly undermined if the disputes linger and grow worse with time.[6] As this Court stated in *Local 1424, International Machinists* v. *NLRB*, 362 U. S. 411, 419, the "policies [underlying Section 10(b)]

6. See *Smith* v. *Evening News Association*, 371 U. S. 195, 202-203, where Justice Black in dissenting, pointed out that in Section 301 cases the application of a period of limitations longer than that provided in Section 10(b) of the Labor-Management Relations Act would open "up a way to defeat the congressional plan adopted over vigorous minority opposition, to expedite industrial peace by requiring that both the complaining party and the Board act promptly in the initiation of unfair labor practice proceedings."

are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

When squarely confronted with the issue of the appropriate limitations period under Sections 301 and 303, two courts have urged with considerable force that the six-month period of limitations should apply in order to accord with the statutory design of the federal labor relations acts. *International U. of Op. Eng.* v. *Fischbach and Moore, Inc.*, 350 F. 2d 936 (C. A. 9, 1965); *Tully* v. *Fred Olson Motor Service Co.*,[7] 134 N. W. 2d 393, ... Wis. ..... (1965). Thus, in *International U. of Op. Eng.* v. *Fischbach and Moore, Inc.*, the Court of Appeals for the Ninth Circuit said:

> "There are strong reasons for the application of a six-month period, borrowed from § 10(b) of the LMRA. . . . We think it is neither logical, nor just, nor in keeping with the policy which Congress has thus far articulated in the field of labor relations that a six-month period shall limit the filing of a complaint with the Board and that some different period, be it based on latches or a different statute of limitations, shall operate to limit the time for commencing a suit for damages under Section 303 based upon the same alleged unfair labor practice. . . . Certainly the distinctions between a complaint before the NLRB over an unfair labor practice and a private suit for damages for the same grievances are not so significant as to eliminate the same pervasive considerations of public policy which demanded the quick disposition of labor management controversy." 350 F. 2d at 937-8.

Nevertheless, after thus considering the federal statutory scheme and noting that "in certain circumstances, alterna-

7. In this case, see also the well-reasoned lower court opinion which is reported at 50 L. C. P. 19, 198 (1965).

tives to the state periods of limitations may be adopted," the Court of Appeals felt constrained to conclude that: "But here, the statute itself, its legislative history, and the pressing weight of authority lead us to hold that California's three-year limitation statute should have been applied." *Id.* at p. 939. The legislative history indicates that application of a six month period would best implement Congressional policy in this area. As observed by Senator Taft, "It is impossible to separate them (the title in the Act). The Committee had difficulty even in separating matters as between titles, and moved some matters back and forth from one title to another." *2 Legislative History of the Labor-Management Relations Act* 1073 (1950). This inter-relationship is further explicated in Senate Report 105 on S. 1126 which asserts that "Section 301 is the only section contained in the title." (At that time, amendments were made later.) "It relates to suits for breach of collective bargaining agreements and should be read in connection with the provisions of Section 8 of Title I, also dealing with breach of contract."

Indeed, the interrelationship between contract actions under Sections 301 and unfair labor practices under the National Labor Relations Act was the fundamental subject reviewed by this Court in *Smith* v. *Evening News Association,* 371 U. S. 195, and, as the facts of that case clearly indicate, contract actions under Section 301 will frequently involve or overlap with matters that could be subjects for unfair labor practice complaints. It is particularly significant that the petitioner, while basically ignoring the interrelationship and overlap between Section 301 actions and unfair labor practice actions, has suggested that to follow the purposes of the federal statutory scheme the six-month limitation should be applied in Section 303 cases. Petitioner rejects the decision of the Ninth Circuit in

Fischbach and Moore, supra, as wrongly decided and recommends that:

> "Since suits under Section 303 are based on the same secondary boycott prohibitions which constitute unfair labor practices under Section 8(b)(4) of the Act, resort to the six-month limitation for charging a violation of that provision before the National Labor Relations Board would appear a more appropriate standard—one which would be uniform throughout the nation and carry out the manifest Congressional purpose." (Pet. Br. p. 20, note 6).

Surely, however, it would be unjust and arbitrarily discriminatory to apply the six-month period of limitations to contract actions arising under Section 303 for the reason that those actions involve overlapping or related unfair labor practices (secondary boycotts) and not to apply the same six-month limitation to contract actions arising under Section 301 where those actions do or may frequently involve related or overlapping unfair labor practices. Thus, for example, petitioner recognizes as it must that if there is to be a uniform federal rule, the six-month limitation of Section 10(b) should be applied in Section 303 contract actions because of that Section's close relationship to unfair labor practices under Section 8(b)(4), but petitioner would recommend some longer limitations period for a Section 301 case such as *Smith* v. *Evening News Association, supra,* where the very essence of the problem was that the contract action overlapped with possible unfair labor practices (also under Section 8).

We submit that if there is to be a uniform federal limitations rule for contract actions arising under Section 301 or under Section 303, the limitations rule must be guided by the history and purposes of its sources, namely, the interrelated federal labor laws, and, accordingly, must follow the Congressional plan embodied in Section 10(b) of the Labor Management Relations Act.

IV.

THERE IS NEITHER A NEED, NOR DO THE FACTS SUPPORT THE APPLICATION OF A TOLLING RULE IN THIS CASE.

Petitioner, having previously in its Brief urged the Court to adopt a Federal period of limitations for Section 301 actions under Point II of its brief, suggests that the statute of limitations in this case was tolled by the filing of the state court suit of *Johnson* v. *Hoosier Cardinal Corporation* under any statute of limitations of not greater than two years duration. (Pet. Br. pp. 20-22.) In order to advance this argument, Petitioner, we submit, has gone contrary to the well-established rules of this Court that prevent a litigant from presenting for consideration matters not in the record or not presented to the lower courts and shifting its theory of recovery as if to treat this Court as one of trial in the first instance. *Virginia Ry. Co.* v. *Mullens*, 271 U. S. 220; *Van Huffel* v. *Harkelrode*, 284 U. S. 225; *Helvering* v. *Wood*, 309 U. S. 344; *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U. S. 334.

The record in this case shows that although the Petitioner had ample opportunity in the District Court and in the Circuit Court below to introduce the record of the State Court action above, it did not choose to do so, but for the first time in this case had injected the pleadings and part of the records of the State Court case in this case by means of inserting these matters into the Appendix attached to its brief. The Petitioner even inserts as part of the record in the Trial Court a letter from the trial judge setting out the reasons for his ruling in the case below. (Pet. App., p. 9.) The record shows that the Petitioner filed its action herein in the District Court on April 8, 1964, and that the Respondent filed its motion to dismiss on May 4, 1964. This theory of tolling of the statute of

limitations which the Petitioner is now urging upon the Court for the first time is not a novel theory, nor did it have its origin in the case relied upon by the Petitioner, *Burnett* v. *New York Central R. R.*, 380 U. S. 424. This Court, in *Herb* v. *Pitcairn*, 325 U. S. 77, had considered this question at length.

Further, the Petitioner in its brief (Pet. Br. p. 23, footnote 9) suggests that it did not make the argument below of the timeliness of the suit under the Indiana Savings Statute[8] because the trial counsel for Petitioner did not think the Indiana statute of limitations applicable in this case, nor does the Petitioner now invoke this saving statute. The Indiana Supreme Court in 1957[9] held that the Indiana tolling statute does not toll the statute of limitations in an action improperly brought as a class action but that the statute continues to run until the proper action is brought. Under the foregoing, it is submitted that this Court should not consider the Petitioner's argument that regardless of the statute of limitations if it is not more than two years, the statute would have tolled.

The Respondent further submits that even should the Court consider that the record of the State Court action is properly before this Court, *Burnett* v. *New York Central R. R.*, 380 U. S. 424 would not toll the statute of limitations barring this action in any event.

It will be noted that the plaintiffs in the state court action relied upon by Petitioner were certain individual employees who attempted to bring the action on behalf of themselves and as members of a class representing the former employees of the Respondent (Pet. App. p. 23), while in this case the plaintiff is the Petitioner herein, the

8. Burns' Indiana Statutes Annotated, Section 2-608 (1946 Replacement).

9. *City of Hobart* v. *Baum*, 145 N. E. 2d 573, 237 Ind. 316; *Hawthorn et al* v. *The State, Ex Rel. Harper*, 57 Ind. 286 (1877).

International union, seeking to recover on behalf of the individual employees the same alleged claims for vacation pay, double damages and attorney fees. This is a different situation than existed in the case of *Burnett* v. *New York Central R. R.*, 380 U. S. 424, where the parties were identical in both the state court case and the case subsequently filed in the federal court.

Further, in the *Burnett* case the action was dismissed in the state court because of improper venue whereas in this case the state court action was denied because it was improperly brought as a class action, but the trial court pointed out that the individual employees each had the right to maintain his own individual action in his own name (Pet. App. p. 10). The Petitioner urges elsewhere in its brief that by reason of this Court's decision in *Smith* v. *Evening News Association*, 371 U. S. 195, the union now has the right under Section 301 to maintain this action on behalf of the individual employees to recover wages, statutory damages and attorney fees, and claims that this right is given under a new federal substantive law. Under this argument, clearly the action filed in the state court below could not be the same action as the Petitioner is now asserting in this action. If Petitioner is seriously urging that the suit filed below is the same suit that is pending before this Court in order to attempt to toll the applicable statute of limitations, then the Petitioner is faced with the plea that the state court action is res judicata.

The Petitioner in this case suggests that a tolling principle which this Court adopted in the *Burnett* case should also be adopted in this case. Although this Court, under the facts in *Burnett* v. *New York Central R. R.*, 380 U. S. 424, formulated a tolling rule to the effect that dismissal for improper venue under a FELA action brought in a state court tolls the federal three year statute of limitations, at footnotes 8 and 9 of its opinion, it pointed out that

most states have statutes that allow transfer of cases for improper venue as well as statutes providing for a so-called saving period, and under Ohio law as well as forty-four other states, causes of action are preserved by these methods. This decision also mentioned the humanitarian purpose behind the statute. The Court, based on the facts in that case, came to the conclusion that in light of the purpose of the statute the need for a tolling formula was justified.

The circumstances of this case, it is submitted, do not warrant tolling under any applicable statute of limitations. As has been pointed out, the state court action was filed by certain individual employees as a class action on February 21, 1958. After the court sustained the demurrer to the third amended complaint, holding that this was not a class action, and after pointing out that the employees could individually maintain their own action, the employees in said state court case refused to plead over and thereby permitted judgment to be taken against them (Pet. App. p. 32). No action was thereafter filed by any of the individual employees although at that time they had the right and ample time under the Indiana law to do so. Thereafter an appeal was taken to the Indiana Appellate Court but was dismissed on April 18, 1963 because of the failure of the plaintiffs to properly perfect such appeal. It should be noted here, however, that in the meantime and on December 10, 1962, this Court rendered its decision in *Smith* v. *Evening News Association*, 371 U. S. 195, upon which the Petitioner justifies its present action. Nevertheless, the Petitioner waited until April 8, 1964, a period of more than eleven months after the judgment in the state court became final, before instituting this case in the District Court below.

Further, the tolling which Petitioner seeks would place the Respondent, or any other litigant, in the position of

having a case resurrected, after the statute had run, because of a new decision handed down which would have the effect of retroactively tolling the statute, long after a company has discontinued its manufacturing business and at a time when no witnesses or records might be available because of the lapse of time (almost nine years in this case). None of the opinions of this Court indicate support for such a rule. There is nothing in the record in this case showing inequitious conduct, undue hardship or policy considerations meriting a formulation. Although it has been the modern trend toward a preference for suits on the merits, Petitioner has advanced no compelling reason for such action in this case, and it must be added that there is general law to the effect that where different parties bring a cause of action under shifting theories of recovery which has been dismissed in another jurisdiction for refusal to plead further the new parties can make no claim of tolling. *34 Am. Jur., "Limitation of Action,"* §§ 268, 269, pp. 220-21; § 271, pp. 221-22; § 267, pp. 219-20; § 288, pp. 232-33; *54 C. J. S., "Limitation of Actions,"* § 289, p. 353, § 290, p. 354, § 293, p. 362.

V.

A STATUTE OF LIMITATIONS GOVERNING WRITTEN CONTRACTS DOES NOT APPLY IN THIS CASE.

Petitioner takes the position in its Brief, at pages 22-24, that in any event this matter is controlled by an Indiana statute of limitations of twenty years duration. In suggesting this result it is urged that considerations of national uniformity require the adoption of this result when considered in light of the policy of Congress in passing the Labor Management Relations Act. The Indiana period of limitations of twenty years is the longest period of limitations in this country concerning actions on written con-

tracts under seal. (See App. B attached to Petition for Writ.) Given this fact, it would seem that Petitioner's argument as to the application of the Indiana twenty year period runs against the import of its argument as to the need for national uniformity based on the policy behind Congressional enactment of Section 301 of the Act. On the one hand Petitioner would have it that a policy of national uniformity requires application of the uniform and nationwide period of limitations to Section 301 actions, while on the other it urges application of the longest local period available, thereby accepting the very premise it argues should be disregarded in these cases—application of varying state period of limitations as applied by the courts in the various states.

In addition, the so-called preference for national formulation urged by Petitioner would indicate in light of the legislative history, court decisions analyzing the Labor Management Relations Act and the Act itself as set forth above gives abundant support for the proposition that a limitation period of twenty years would clearly work at cross purposes with the entire body of currently recognized principles applicable to federal labor law, among which are, of course, those of stability and dispatch.

Here, as elsewhere in its Brief, Petitioner assumes that its action is based "exclusively" on a written collective bargaining agreement (Pet. Brief, page 24). In the first instance, if this be so, it is extremely difficult to read Petitioner's complaint filed in the District Court without coming to a contrary conclusion. One only need scan paragraphs 7 through 10 of this complaint (R. 4-5) to be met with the premises that at the very least Petitioner's action not only stems from the fact that "the defendant corporation discontinued employment of the employees whose names are set out in the aforesaid Exhibit 'B'," but, in addition, from the existence of both employment records

and certain Acts of the General Assembly for the State of Indiana (R. 3-5). In fact, Petitioner's request for relief is unintelligible unless resort be made to the statutory law of the State of Indiana.

In sum, the allegations in Petitioner's complaint at trial on the merits would have to be supported not only by recourse to a great deal of parol evidence supporting the existence of an employment relationship between Respondent and its employees, which fact is not found within the four corners of the collective bargaining agreement, but also to the laws of the State of Indiana as to the existence of wage claim statutes and the provisions in these statutes for recovery of penalties and attorney fees.

This is, of course, why the trial court granted Respondent's motion to dismiss since the uncontroverted evidence before it in the form of the affidavit of Respondent's president (R. 11) shows that these employees worked under contracts of employment that were "verbal or oral." Therefore, under Indiana law, the gravamen of Petitioner's action for wages due and statutory penalties coupled with attorney fees, necessarily depended on the use of parol evidence. Under Indiana law in actions partly based on a written collective bargaining agreement, or other written contracts, and partly on oral or parol contracts of employment, or other oral or parol contracts, are governed by a six year period of limitations applicable to actions on contracts not in writing.[10]

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10. *Albrecht* v. *Indiana Harbor Belt R. Co.*, 178 F. 2d 577 (CCA-7 1949); *Kordewick* v. *Indiana Harbor Belt R. Co.*, 157 F. 2d 753 (CCA-7 1946), cert. den. 329 U. S. 806; *Michael* v. *Rainer*, 205 N. E. 2d 543, ... Ind. .... (1965); *Board of Commissioners of Marion County* v. *Shipley*, 77 Ind. 553 (1887); *Carskaddon* v. *City of South Bend*, 141 Ind. 596, 39 N. E. 667 (1895); *Moore* v. *Ohl*, 65 Ind. App. 691, 116 N. E. 9 (1917); *Hackleman* v. *Board of Commissioners of Henry County*, 94 Ind. 36 (1889); *Tomilson* v. *Briles*, 101 Ind. 538, 1 N. E. 63 (1885); *Higham* v. *Harris*, 108 Ind. 246, 8 N. E. 255 (1886); *6 Indiana Law Encyclopedia*, "Contracts" § 51, p. 110; *19 Indiana Law Encyclopedia*, "Limitations of Actions," § 21, p. 17.

Petitioner's main contention, that this is a contract in writing and, therefore, the twenty year statute would apply, is based on the premise that *Smith* v. *Evening News Association*, 371 U. S. 195, rejected the individual contract of employment theory contained in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, and, therefore, automatically made all actions involving a collective bargaining agreement under Section 301 an action on a written contract. In the *Smith* case no question of a statute of limitations was involved, as is involved in this case, nor was there any indication as to the type of employment contract which the individual employees had with the employer, nor does *Smith* say that in order for an employee to recover his rights must be based solely on the written collective bargaining agreement. *Smith* simply held that if employees' rights were in any way based on a collective bargaining agreement the employees would have a standing in a state or federal court to prosecute an action under Section 301, but it did not discuss the situation where the contract of employment was oral, supplemented by the written collective bargaining agreement, as is the case here.

There may well be cases in which the individual employees signed written employment contracts with the employer and which contracts would also be supplemented by a written collective bargaining agreement. However, such is not the case here and the affidavit of Respondent's president attached to the motion to dismiss shows, as pointed out above, that the employment contracts with the employees were not written contracts but were verbal or oral contracts. It will be noted the Petitioner did not controvert this affidavit.

Mr. Justice Jackson formulated what has been identified as the "eclectic" theory of the employment relationship as it relates to a collective bargaining agreement by stating:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representative of the unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." *J. I. Case Co.* v. *NLRB*, 321 U. S. 332.

See also *MacKay* v. *Loew's, Inc.*, 182 F. 2d 170 (1950), cert. den. 340 U. S. 828; reh. den. 340 U. S. 885; *Kosley* v. *Goldblatt Bros., Inc.*, 251 F. 2d 558 (CCA-7, 1958), cert. den. 357 U. S. 904. Although the theory has been subject to some criticism, it is clear that the very structure of the Labor Management Relations Act itself recognizes the fact that the employment relationship is of an essentially tripartite nature where an employer has a collective bargaining agreement. Thus, Section 2(3) of the Act, 29 U. S. C. A. 152, defines the term "employee" without reference to a collective bargaining agreement, Section 2(2) of the Act defines the term "employer" without reference to a collective bargaining agreement, and Section 2(4) defines the term "representative" without reference to the term "collective bargaining agreement". In sum, Section 2 of the Act, containing the definitions of the terms used in the Act, makes no reference to the existence of a collective bargaining agreement as a condition precedent to the existence of an employer, the employment relationship or for that matter of an employee representative, clearly inferring that none of these relationships or statutes has its origins in such an agreement.

The court below correctly held that the six year statute of limitations applied in this action. Incidentally, the court's attention is called to the fact that a two year

statute of limitations applies to an action to recover penalties under the Indiana statute (Res. App. p. 2). Inasmuch as Petitioner is seeking recovery of statutory penalties in its complaint the lower court could have held that the two year statute applied in this case rather than the six year statute because Petitioner coupled with the claim for wages the claim for statutory penalties. In view of its decision, however, it was not necessary to reach this point.

CONCLUSION.

For the foregoing reasons Respondent respectfully submits that the judgment below should be affirmed.

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January, 1966.

APPENDIX.

40-102. Semimonthly payment — Penalty and damages. —Every such person, firm, corporation or association who shall fail to make payment of wages to any such employee, as provided in section one [§ 40-101] of this act, shall, as liquidated damages for such failure, pay to such employee for each day that the amount due to him remains unpaid ten [10] per cent of the amount due to him in addition thereto, not exceeding double the amount of wages due, and said damages may be recovered in any court having jurisdiction of a suit to recover the amount due to such employee, and in any suit so brought to recover said wages, or the liquidated damages for nonpayment thereof, or both, the court shall tax and assess as costs in said case a reasonable fee for the plaintiff's attorney or attorneys [Acts 1933, ch. 47, § 2, p. 371].

40-104. Weekly payment.—Every corporation, association, company, firm or person engaged in this state in mining coal, ore or other mineral, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading, barrels, brick, tile, machinery, agricultural or mechanical implements, or any article of merchandise, shall pay each employee of such corporation, company, association, firm or person, if demanded, at least once every week, the amount due such employee for labor, and such payments shall be in lawful money of the United States, and any contract to the contrary shall be void [Acts 1911, ch. 68, § 1, p. 110].

40-105. Weekly payment — Penalty and damages. — Every corporation, company, association, firm or person who shall fail for ten [10] days after demand of payment

has been made to pay employees for their labor, in conformity with the provisions of this act [§§ 40-104-40-109], shall be liable to such employee for the full value of his labor, to which shall be added a penalty of one dollar [$1.00] for each succeeding day, not exceeding double the amount of wages due, and a reasonable attorney's fee, to be recovered in a civil action and collectable without relief [Acts 1911, ch. 68, § 4, p. 110].

2-601. *Limitation of actions—Six-year Statute.*—The following actions shall be commenced within six (6) years after the cause of action has occurred, and not afterwards.

First. On accounts and contracts not in writing. . . . (Acts 1881 (Spec. Sess.) Ch. 38, § 37, p. 240; 1951; Ch. 301, § 1, p. 999.)

2-602. *Limitation of actions.—Two, five, six, ten and twenty years.*—The following actions shall be commenced within the periods herein.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years. . . .

Sixth. Upon contracts in writing other than those for the payment of money within twenty (20) years. . . . (Acts 1881 (Spec. Sess.), Ch. 38, § 38, p. 240; 1951, Ch. 301, § 2, p. 999.)